

JUDGE HOLWELL

11 CIV 6646

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

DOC #

CHARLES SEIFE,

20 Cooper Square, #628

New York, NY 10003

Plaintiff,

v.

NATIONAL INSTITUTES OF HEALTH,

9000 Rockville Pike

Bethesda, MD 20892

and

DEPARTMENT OF HEALTH AND

HUMAN SERVICES,

200 Independence Ave. SW

Washington, DC 20201

Defendants.

2011 SEP 22 PM 3:12  
U.S.D. OF N.Y.  
RECEIVED COURT  
CLERK

**COMPLAINT FOR INJUNCTIVE RELIEF**

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, to order the production of agency records, concerning information about conflicts of interest at NIH, which defendants have improperly withheld from plaintiff.

2. This court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

### **Parties**

3. Plaintiff, Charles Seife, is an associate professor of journalism at New York University as well as a news reporter, and he is the requester of the records which defendants are now withholding. Plaintiff has requested this information for use in a news story about poor oversight of conflict of interest at the National Institutes of Health (as well as at several organizations that have received NIH grants) intended for publication in *Popular Science* magazine. Prompt release of this information is essential to meeting a deadline for the scheduled publication, and is also important because there exists immediate public interest in this information.

4. Defendant National Institutes of Health (NIH) is an agency in the executive branch of the United States government and has possession of the documents that plaintiff seeks. Defendant NIH is part of defendant HHS, and has sole responsibility for processing FOIA requests addressed to NIH and shares responsibility for processing administrative appeals with defendant HHS.

5. Defendant Department of Health and Human Services (HHS) is an agency in the executive branch of the United States Government and has possession of the documents that plaintiff seeks. Defendant NIH is a part of defendant HHS. An administrative appeal stemming from a NIH FOIA determination is addressed to defendant HHS. Defendant HHS passes the appeal to defendant NIH for further processing, and it is then returned to defendant HHS before the result is communicated to the appellant.

### **Statement of Facts**

6. By letter dated 24 February 2011, plaintiff requested access to copies of NIH-2802 forms filed within the past several years. Each NIH-2802 form, entitled "Annual Report of Referrals for Non-Compliance With Ethics Requirements," details the number of times defendant NIH's employees have been referred to their supervisors for assistance in obtaining compliance and/or possible disciplinary action. Plaintiff also requested access to copies of various documents, including requests for recusals, for disqualification from official duties, and for waivers of actual conflicts of interest, that can be found in the ethics files of 44 individuals. A copy of this letter is attached as Exhibit 1.

7. After a telephone conversation with a FOIA officer employed by defendant NIH, plaintiff provided additional information by e-mail to help defendant fulfil plaintiff's request. A copy of this e-mail is attached as Exhibit 2.

8. By letter dated 9 March 2011, defendant NIH acknowledged receipt of plaintiff's FOIA request. In it, defendant NIH stated that for the purpose of assessing fees, plaintiff would be assigned to the "other requester" category as described in 45 C.F.R. § 5.41(d) rather than the "Educational and scientific institutions and news media" category described in 45 C.F.R. § 5.41(c) to which he is entitled. A copy of this letter is attached as Exhibit 3.

9. By e-mail dated 18 March 2011, plaintiff communicated to defendant NIH that he deserved to be placed in the "Educational and scientific institutions and news media" category, and should not be charged for search fees or for the first 100 pages of copying. He further asserted that, as

the FOIA request is in the public interest, he should not be assessed any fees at all. A copy of this e-mail is attached as Exhibit 4.

10. By e-mail dated 18 March 2011, defendant NIH communicated to plaintiff that questions regarding a fee waiver would be addressed if it was anticipated that there would be fees associated with plaintiff's request. A copy of this e-mail is attached as Exhibit 5.

11. By letter dated 30 June 2011, plaintiff was denied access to the requested information by defendant NIH. Defendant NIH did not give grounds for denying access to the NIH-2802 forms. Though defendant NIH found numerous ethics-file records responsive to plaintiff's request, defendant NIH denied access to the plaintiff on the grounds that each of these records was exempt from disclosure in entirety under Exemptions 3, 5 and 6, 5 U.S.C. §§ 552(b)(3), (b)(5), and (b)(6) respectively. A copy of this letter is attached as Exhibit 6.

12. The ethics-file information plaintiff requested is not exempted by 5 USC App. 4 § 107(a)(2) or any other federal statute. On the contrary, the release of the information is mandated by 18 USC § 208(d)(1). Further, the information has neither predecisional nor deliberative character to it. In addition, the information does not pose a "clearly unwarranted invasion of personal privacy" for a number of reasons, including the fact that other federal agencies release analogous information as a matter of course and that the compelling public interest in releasing these document far outweighs the small privacy interest in keeping the requested information private. As a result, the information requested is not exempt under 5 U.S.C. §§ 552(b)(3), (b)(5), or (b)(6) and is thus being improperly withheld. Furthermore, defendant NIH failed to release the reasonably segregable portions of the requested records as required by 5 U.S.C. § 552(b). These facts, coupled with defendant NIH's failure to provide any justification whatsoever for not

releasing the NIH-2802 forms that plaintiff requested, led plaintiff to appeal the denial of this request by letter dated 14 July 2011. As required, this letter was addressed to defendant HHS. A copy of this letter is attached as Exhibit 7.

13. By letter dated 25 July 2011, defendant HHS acknowledged receipt of plaintiff's administrative appeal. A copy of this letter is attached as Exhibit 8.

14. On 19 August, the statutory period for responding to plaintiff's appeal, as delineated in 5 U.S.C. § 552(a)(6)(A)(ii), expired without further response from either defendant. As a result, plaintiff has exhausted his administrative remedies, as per 5 U.S.C. § 552(a)(6)(C).

15. On 22 August, seeking to avoid a lawsuit, plaintiff telephoned defendant to find out the status of his appeal. On 23 August, a FOIA officer employed by defendant HHS left a message on plaintiff's answering machine saying that there were "a couple of appeals" ahead of plaintiff's that needed to be processed first, and that defendant NIH would "get to [plaintiff's appeal] as soon as [defendant] can."

16. By e-mail dated 23 August, plaintiff requested clarification, asking for information about how long it would take to process the appeal, whether the appeals are processed on a multitrack basis, and how many NIH appeals are in the queue. A copy of this e-mail is attached as Exhibit 9.

17. By e-mail dated 25 August, a FOIA officer employed by defendant HHS e-mailed plaintiff, stating that "[Defendant HHS] will send you a formal response to your inquiry shortly." A copy of this e-mail is attached as exhibit 10.

18. By e-mail dated 16 September, a FOIA officer employed by defendant HHS e-mailed plaintiff, stating that "Because of the volume of appeals that are received, we are unable to comply with the 20 working days time limit as provided by statute. However, we presume your appeal should be completed in the next few months." Defendant HHS did not answer plaintiff's other questions. A copy of this e-mail is attached as exhibit 11.

18. Plaintiff has a right of access to the requested information under 5 U.S.C. § 552(a)(3), and there is no legal basis for defendant's denial of such access.

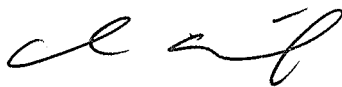
#### **Requested relief**

WHEREFORE, plaintiff requests this Court:

- (1) Order defendants to provide access to the requested documents;
- (2) Expedite this proceeding as provided for in 28 U.S.C. § 1657;
- (3) Order defendants not to assess any fees for fulfilling plaintiff's request;
- (4) Award plaintiff costs and reasonable attorneys fees in this action, as provided in 5 U.S.C. § 552(a)(4)(E);
- (5) Issue a written finding, as per 5 U.S.C. § 552(a)(4)(F), that the circumstances regarding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding; and

(6) Grant such other and further relief as may deem just and proper.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Charles Seife', is written above a horizontal line.

Charles Seife

20 Cooper Sq. #628

New York, NY 10003

(212)673-1645

Dated: 22 September, 2011

**NEW YORK UNIVERSITY**  
ARTS & SCIENCE

EXHIBIT 1

Charles Seife, Associate Professor  
ARTHUR L. CARTER JOURNALISM INSTITUTE

Freedom of Information Office, NIH  
Building 31, Room 5B35  
9000 Rockville Pike  
Bethesda, MD 20892

24 February, 2011  
[Amended -- see note below]

Dear FOI officer,

This is a request under the Freedom of Information Act.

I request copies of the following documents:

-- All NIH-2802 forms filed between January 1 2005 and February 28 2011.

-- Any documents, whether in paper or electronic or other format, related to managing real and/or apparent conflicts of interest of, by, for, or relating to any of the following individuals:

Alex Adjei  
Miroslav Backonia  
Nir Barzilai  
Linda Brubaker  
Robert Califf

Carlos Camargo  
Arul Chinnaiyan  
Samuel Cohen  
David D'Alessio  
Janice Dutcher

Scott Emerson  
Matthew Ellis  
Charis Eng  
Carlos Ferrario  
James Freston

Peter Ganz  
Leonard Gomella  
Ramaswami Govindan  
David Harpole  
Gregory Holmes

David Hooper  
David Kass  
Robert Frederick Klein





Christopher Kontos  
John Krystal

Joseph Lane  
David Margolis  
Sanjay Mathew  
Roberto Pacifici  
Jerry Palmer

Giovanni Piedimonte  
Louis Ptacek  
Scott Rivkees  
Junichi Sadoshima  
Sanjay Sethi

Yvette Sheline  
David G. Smith  
Kimberly Smith  
Solomon Snyder  
Lawrence Stanberry

David Quinn  
David Wohl  
Huda Zoghbi  
Jon-Kar Zubieta

including, but not limited to any

- HHS-520 forms
- NIH-2657 forms\*
- HHS-521 forms
- SF-278 forms
- ethics agreement(s)
- documents granting a waiver of actual conflict of interest
- documents granting authorization to participate in an official matter despite the appearance of a conflict of interest
- documents requesting or granting recusal or disqualification from official duties
- documentation of a denial of a waiver of actual conflict of interest, authorization to participate in an official matter despite the appearance of a conflict of interest, or a request for recusal or disqualification
- NIH-2850 forms
- other fully- or partially-releasable documents in the individual's ethics file

dating from January 1, 2005 to the present.

In case any of these requests are denied, I request that a reason for the denial is given in writing, and the non-exempt portions of those records be released with the omissions clearly explained.



I understand the large amount of work that fulfilling this FOIA request requires, and am amenable to modifying it or breaking it up into several requests to help reduce the burden or expedite processing; feel free to contact me to discuss.

If possible, I would like to receive the documents in electronic format -- PDFs, DOCs, TXTs, RTFs, TIFFs, JPGs, GIFs, or other commonly-used formats would be fine. As a representative of the news media, I request a waiver of fees.

I look forward to your response.

Thank you very much,

Charles Seife  
cgseife@nasw.org  
+1 212 998 7894

\* Note: an earlier version of this FOIA had the incorrect form number; I am seeking the NIH-2657 [supplement to the HHS-520], not the NIH-2867. Please feel free to disregard the previous version of the FOIA and use this one instead.



## EXHIBIT 2

Original-recipient: rfc822;cs129@mail.nyu.edu  
 X-Mailer: QUALCOMM Windows Eudora Version 7.1.0.9  
 Date: Wed, 02 Mar 2011 11:09:42 -0500  
 To: "Butler, Brenda (NIH/OD) [E]" <ButlerB@od31tm1.od.nih.gov>  
 From: Charles Seife <cs129@nyu.edu>  
 Subject: FOIA followup re: SF-278 forms and  
 Cc: Charles Seife <cs129@nyu.edu>

Dear Ms. Butler,

As per your request on the telephone, attached are GE-201 forms covering all of the individuals named in my FOIA of 24 February 2011 (attached, for your reference). Again, I suspect that these individuals filed OGE-450 forms rather than SF-278 forms. (Note that I did not request -- nor do I expect -- copies of any OGE-450 forms, as I know they are kept confidential.) However, as I do want copies of the SF-278 forms in the off chance that any of the individuals did, in fact, file them, I am submitting the GE-201 forms (8 in all) you requested. I have signed them electronically; please consider my electronic signature to be binding.

Also, as promised in our telephone conversation, appended below are details about which advisory committee(s) the individuals sit upon. The data below goes: Last Name, First Name, Middle Initial -- then, the abbreviations for the Program, Committee, and Subcommittee (if applicable.) These abbreviations follow what can be found at <http://ofacp.od.nih.gov/committee/index.html>

Please note that there might be a few typographic errors in the list below; if, based on the information I have given you, you are unable to verify that any of these individuals sit on the committee named, please contact me and I will endeavor to give you better information.

Again, these individuals serve on NIH committees, and are therefore bound by NIH ethics rules and should have filed all the requisite NIH ethics paperwork and each should have an ethics file. The paperwork that I request in my FOIA should be releasable in whole or in part -- and, as there is a compelling public interest that will be served by the disclosure of these records, I expect that you will be able to fulfill my FOIA request.

Thanks again,  
 Charles Seife

LastName	FirstName	MI	Program	Committee	Subcommittee
ADJEI	ALEX	A	CSR	OTC	CONC
BACKONJA	MIROSLAV	M.	NINDS	NSD	NSDC
BARZILAI	NIR	J	NIA	NIA	NIAB
BRUBAKER	LINDA		CSR	DKUS	UKGD
CALIFF	ROBERT		NIA	NACA	NACA
CAMARGO	CARLOS	A	NHBLI	HLB	CLTR
CHINNAIYAN	ARUL	M	NCI	BSA	BSA
COHEN	SAMUEL	M	NIEHS	ESBSC	ESBSC
D'ALESSIO	DAVID	A	CSR	EMNR	CIDO
DUTCHER	JANICE	P	CSR	OTC	CBSS
ELLIS	MATTHEW	J	CSR	OTC	CONC
EMERSON	SCOTT	S	NHBLI	HLB	CLTR
ENG	CHARIS		NHGRI	HGBSC	HGBSC
Ferrario	Carlos	M	CSR	CVRS	CCHF
FRESTON	JAMES	W	NIDDK	DKNAC	DKNAC
Ganz	Peter		CSR	CVRS	CICS
GOMELLA	LEONARD	G	NCI	NCI	NCIH
GOVINDAN	RAMASWAMY		NCI	NCI	NCIH
HARPOLE	DAVID	H	CSR	OTC	CBSS
HOLMES	GREGORY	L.	NINDS	NST	NST1
HOOPER	DAVID	C	CSR	IDM	DDR

Kass	David	A	CSR	CVRS	CCHF
KLEIN	ROBERT FREDERICK		NIDDK	DDK	DDKB
KONTOS	CHIRSTOPHER	D.	CSR	VH	VCMB
KRYSTAL	JOHN	H	NIAAA	NCAA	NCAA
Lane	Joseph	M.	NIAMS	AMS	AMS
MARGOLIS	DAVID	M	CSR	AARR	ACE
MATHEW	SANJAY	J	NIMH	NIMH	ITVA
Pacifici	Roberto		NIAMS	AMS	AMS
PALMER	JERRY	P	NIDDK	DKNAC	DKNAC
Piedimonte	Giovanni		CSR	CVRS	RIBT
PTACEK	LOUIS	J.	NINDS	NANDSC	NANDSC
Rivkees	Scott	A	NICHD	CHHD	CHHDA
Sadoshima	Junichi		CSR	CVRS	MIM
Sethi	Sanjay		CSR	CVRS	LCMI
SHELINE	YVETTE	I	CSR	BDCN	NPAS
SMITH	DAVID	G.	NCRR	RIRG	RIRGC
Smith	Kimberly	Y.	NIAID	MIDA	AIDS
SNYDER	SOLOMON	H	OD	SMRB	SMRB
Stanberry	Lawrence	R.	NIAID	DIRBSC	DIRBSC
QUINN	DAVID	I	NCI	NCI	NCIH
WOHL	DAVID	A	CSR	AARR	BSCH
ZOGHBI	HUDA	Y	OD	SMRB	SMRB
ZUBIETA	JON-KAR		NIDA	NACDA	NACDA

###


[GE201.Seife.1.pdf](#)

[GE201.Seife.2.pdf](#)

[GE201.Seife.3.pdf](#)

[GE201.Seife.4.pdf](#)

[GE201.Seife.5.pdf](#)

[GE201.Seife.6.pdf](#)

[GE201.Seife.7.pdf](#)

[GE201.Seife.8.pdf](#)



Seife.FOIA.24Feb2011.pdf



## DEPARTMENT OF HEALTH &amp; HUMAN SERVICES

Public Health Service

National Institutes of Health  
 Freedom of Information Office  
 9000 Rockville Pike  
 Building 31, Room 5B-35  
 Bethesda, MD 20892-2107  
 FAX: (301) 402-4541  
 PHONE: (301) 496-5633

March 9, 2011

Mr. Charles Seife  
 Associate Professor  
 New York University  
 20 Cooper Square, 6<sup>th</sup> Floor  
 New York, New York 10003

Re: NIH FOI Case No. 38631

Dear Mr. Seife:

This acknowledges your February 24, 2011, Freedom of Information Act (FOIA) request addressed to the Freedom of Information Officer, National Institutes of Health (NIH). You requested various ethics-related documents pertaining to 44 named individuals from January 1, 2005 – February 28, 2011. In an email dated March 2, 2011 to me, you clarified that you did not want to receive any OGE-450 forms. Specifically you requested the following 13 items:

1. All NIH-2802 forms filed between January 1, 2005 and February 28, 2011;
2. Any documents related to managing real and/or apparent conflicts of interest;
3. HHS-520 forms;
4. NIH-2657 forms;
5. HHS-521 forms;
6. SF-278 forms;
7. Ethics agreement(s);
8. Documents granting a waiver of actual conflict of interest;
9. Documents granting authorization to participate in an official matter despite appearance of a conflict of interest;
10. Documents requesting or granting recusal or disqualification from official duties;
11. Documentation of a denial of a waiver of actual conflict of interest, authorization to participate in an official matter despite the appearance of a conflict of interest, or request for recusal or disqualification;
12. NIH-2850 forms; and
13. Other fully-or-partially releasable documents in the individual's ethics file dating from January 1, 2005 to the present.

You requested that information for the following 44 individuals as related to their association with the indicated NIH Institute or Center.

Page 2 – Seife (38631)

LastName	FirstName	MI	Program	Committee	Subcommittee
ADJEI	ALEX	A	CSR	OTC	CONC
BACKONJA	MIROSLAV	M.	NINDS	NSD	NSDC
BARZILAI	NIR	J	NIA	NIA	NIAB
BRUBAKER	LINDA		CSR	DKUS	UKGD
CALIFF	ROBERT		NIA	NACA	NACA
CAMARGO	CARLOS	A	NHBLI	HLB	CLTR
CHINNAIYAN	ARUL	M	NCI	BSA	BSA
COHEN	SAMUEL	M	NIEHS	ESBSC	ESBSC
D'ALESSIO	DAVID	A	CSR	EMNR	CIDO
DUTCHER	JANICE	P	CSR	OTC	CBSS
ELLIS	MATTHEW	J	CSR	OTC	CONC
EMERSON	SCOTT	S	NHBLI	HLB	CLTR
ENG	CHARIS		NHGRI	HGBSC	HGBSC
Ferrario	Carlos	M	CSR	CVRS	CCHF
FRESTON	JAMES	W	NIDDK	DKNAC	DKNAC
Ganz	Peter		CSR	CVRS	CICS
GOMELLA	LEONARD	G	NCI	NCI	NCIH
GOVINDAN	RAMASWAMY		NCI	NCI	NCIH
HARPOLE	DAVID	H	CSR	OTC	CBSS
HOLMES	GREGORY	L.	NINDS	NST	NST1
HOOPER	DAVID	C	CSR	IDM	DDR
Kass	David	A	CSR	CVRS	CCHF
KLEIN	ROBERT FREDERICK		NIDDK	DDK	DDKB
KONTOS	CHRISTOPHER	D.	CSR	VH	VCMB
KRYSTAL	JOHN	H	NIAAA	NCAA	NCAA
Lane	Joseph	M.	NIAMS	AMS	AMS
MARGOLIS	DAVID	M	CSR	AARR	ACE
MATHEW	SANJAY	J	NIMH	NIMH	ITVA
Pacifici	Roberto		NIAMS	AMS	AMS
PALMER	JERRY	P	NIDDK	DKNAC	DKNAC
Piedimonte	Giovanni		CSR	CVRS	RIBT
PTACEK	LOUIS	J.	NINDS	NANDSC	NANDSC
Rivkees	Scott	A	NICHD	CHHD	CHHDA
Sadoshima	Junichi		CSR	CVRS	MIM
Sethi	Sanjay		CSR	CVRS	LCMI
SHELINE	YVETTE	I	CSR	BDCN	NPAS
SMITH	DAVID	G.	NCCR	RIRG	RIRGC
Smith	Kimberly	Y.	NIAID	MIDA	AIDS
SNYDER	SOLOMON	H	OD	SMRB	SMRB
Stanberry	Lawrence	R.	NIAID	DIRBSC	DIRBSC
QUINN	DAVID	I	NCI	NCI	NCIH
WOHL	DAVID	A	CSR	AARR	BSCH
ZOGHBI	HUDA	Y	OD	SMRB	SMRB
ZUBIETA	JON-KAR		NIDA	NACDA	NACDA.

Page 3 – Seife (38631)

We have queried the appropriate offices for records responsive to your request. If any documents responsive to your request are located, they will be reviewed for releasability, and all releasable information will be sent to you. We will do everything possible to comply with your request in a timely manner. Please feel free to call me on (301) 496-5633 for additional information or to inquire about the status of your request.

Provisions of the FOIA allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the Department of Health and Human Services (DHHS) FOIA Regulations as they apply to "other" requesters. As an "other" category requester you will be charged for duplication at 10-cents per page although the first 100 pages are free; 2 hours of search time are free and thereafter search time is charged at the hourly rate (\$23.00, \$46.00 and \$83.00) of the searcher; there is no charge for review time. Please be advised that the DHHS FOIA Regulations allow us to charge for search time even if we do not locate any responsive records or if we determine that some or all of the responsive records are exempt under one of the FOIA's nine exemptions. If there are any fees associated with processing this request, you will be sent an invoice with our final response.

Sincerely,

A handwritten signature in cursive script, reading "Brenda J. Butler". The signature is written in black ink and is positioned above the printed name.

Brenda J. Butler

Freedom of Information Specialist, NIH



Return-path: <cs129@nyu.edu>  
Received: from mx3.nyu.edu ([128.122.118.243])  
by mail.alt.home.nyu.edu (Sun Java(tm) System Messaging Server 6.3-11.01  
(built Feb 12 2010; 64bit))  
with ESMTP id <OLI900FPVOPX4280@mail.alt.home.nyu.edu> for  
cs129@mail.nyu.edu;  
Fri, 18 Mar 2011 14:58:46 -0400 (EDT)  
Original-recipient: rfc822;cs129@mail.nyu.edu  
Received: from D9Q5X981.nyu.edu  
(SEIFE-XP.JOURNALISM.FAS.NYU.EDU [128.122.160.197])  
by mx3.nyu.edu (8.13.8/8.13.8) with ESMTP id p2IIwCj019182; Fri,  
18 Mar 2011 14:58:45 -0400 (EDT)  
Message-id: <201103181858.p2IIwCj019182@mx3.nyu.edu>  
X-Mailer: QUALCOMM Windows Eudora Version 7.1.0.9  
Date: Fri, 18 Mar 2011 15:01:02 -0400  
To: "Butler, Brenda (NIH/OD) [E]" <ButlerB@od3ltml.od.nih.gov>  
From: Charles Seife <cs129@nyu.edu>  
Subject: NIH FOI case no. 38631  
Cc: charles Seife <cs129@nyu.edu>  
MIME-version: 1.0  
Content-type: text/plain; charset=us-ascii; format=flowed  
X-Mozilla-Status: 8001  
X-Mozilla-Status2: 00000000  
X-Mozilla-Keys:  
Content-transfer-encoding: 8bit

Dear Ms. Butler,

I have just received your note dated March 9, 2011. Thank you very much for your work on the request thus far.

I am obliged, however, to point out that you have made one error.

You have classified me in the "other" requester category, rather than in the "news media, educational, or scientific requesters" category, where I belong.

As you know, I am a professor of journalism and a working journalist who publishes regularly in newspapers, magazines, online, and in books. This particular FOI request is intended to provide information for a journalistic work in progress which is intended for publication in a major magazine. (In fact, the request is dual purpose as it has an educational component as well, but that is secondary.)

As a member of the media (and, secondarily, as an educator), I am entitled to be placed in the "news media, educational, or scientific requesters" category. As such, I should only be charged for duplication fees beyond the first 100 pages.

Further, I assert that this request is in the public interest, because it is likely to contribute significantly to public understanding of the operations and activities of the government, and I therefore request a waiver of fees.

Thank you,  
Charles Seife

-----

Charles Seife, Associate Professor  
Arthur L. Carter Journalism Institute  
New York University  
+1 212 998 7894; [charles.seife@nyu.edu](mailto:charles.seife@nyu.edu)

EXHIBIT 5

Return-path: <ButlerB@od31tml.od.nih.gov>  
Received: from mx4.nyu.edu ([128.122.118.244])  
by mail.alt.home.nyu.edu (Sun Java(tm) System Messaging Server 6.3-11.01  
(built Feb 12 2010; 64bit))  
with ESMTTP id <OLI900GAJS4V1030@mail.alt.home.nyu.edu> for  
csl29@mail.nyu.edu;  
Fri, 18 Mar 2011 16:12:31 -0400 (EDT)  
Original-recipient: rfc822;csl29@mail.nyu.edu  
Received: from rl.home.nyu.edu (R1.HOME.NYU.EDU [128.122.118.240])  
by mx4.nyu.edu (8.13.8/8.13.8) with ESMTTP id p2IKBjfu002236 for  
<csl29@nyu.edu>; Fri, 18 Mar 2011 16:12:31 -0400 (EDT)  
Received: from nihxway3out.hub.nih.gov ([128.231.90.111])  
by rl.home.nyu.edu with ESMTTP; Fri, 18 Mar 2011 16:12:18 -0400  
X-IronPortListener: Outbound SMTP  
X-IronPort-Anti-Spam-Filtered: true  
X-IronPort-Anti-Spam-Result:  
AgkBAOdZg02cKEdK/2dsb2JhbACYOo04d6lbnUoCgxOCTgSQTIhf  
Received: from unknown (HELO NIHHTRC.nih.gov) ([156.40.71.74])  
by nihxway3out.hub.nih.gov with ESMTTP; Fri, 18 Mar 2011 16:12:17 -0400  
Received: from NIHMLBX06.nih.gov ([156.40.71.36])  
by NIHHTRC.nih.gov ([156.40.71.74]) with mapi; Fri, 18 Mar 2011 16:12:17 -  
0400  
From: "Butler, Brenda (NIH/OD) [E]" <ButlerB@od31tml.od.nih.gov>  
To: 'Charles Seife' <csl29@nyu.edu>  
Disposition-notification-to: ButlerB@od31tml.od.nih.gov  
Date: Fri, 18 Mar 2011 16:12:17 -0400  
Subject: RE: NIH FOI case no. 38631  
Thread-topic: NIH FOI case no. 38631  
Thread-index: Acvln0J8jXXLg9cQ2yD5LHMkWXrPwACVmkW  
Message-id: <C9C8DB00D4323B458D541B5338F250893933BD6DE9@NIHMLBX06.nih.gov>  
References: <201103181858.p2IIwbCj019182@mx3.nyu.edu>  
In-reply-to: <201103181858.p2IIwbCj019182@mx3.nyu.edu>  
Accept-Language: en-US  
Content-language: en-US  
acceptlanguage: en-US  
Content-type: text/plain; charset=us-ascii; format=flowed  
MIME-version: 1.0  
X-Mozilla-Status: 8001  
X-Mozilla-Status2: 00000000  
X-Mozilla-Keys:  
Content-transfer-encoding: 8bit

Dear Mr. Seife,

Thank you for your recent e-mail. We will address your request for a fee waiver if we anticipate that there will be fees associated with processing your request.

Thanks.

Brenda

Brenda J. Butler  
NIH/OD/OCPL  
Freedom of Information Specialist  
Bldg. 31, Rm. 5B35

9000 Rockville Pike  
Bethesda, MD 20892-2107  
Phone: 301-496-5633  
Fax: 301-402-4541

-----Original Message-----

From: Charles Seife [mailto:cs129@nyu.edu]  
Sent: Friday, March 18, 2011 3:01 PM  
To: Butler, Brenda (NIH/OD) [E]  
Cc: charles Seife  
Subject: NIH FOI case no. 38631

Dear Ms. Butler,

I have just received your note dated March 9, 2011. Thank you very much for your work on the request thus far.

I am obliged, however, to point out that you have made one error.

You have classified me in the "other" requester category, rather than in the "news media, educational, or scientific requesters" category, where I belong.

As you know, I am a professor of journalism and a working journalist who publishes regularly in newspapers, magazines, online, and in books. This particular FOI request is intended to provide information for a journalistic work in progress which is intended for publication in a major magazine. (In fact, the request is dual purpose as it has an educational component as well, but that is secondary.)

As a member of the media (and, secondarily, as an educator), I am entitled to be placed in the "news media, educational, or scientific requesters" category. As such, I should only be charged for duplication fees beyond the first 100 pages.

Further, I assert that this request is in the public interest, because it is likely to contribute significantly to public understanding of the operations and activities of the government, and I therefore request a waiver of fees.

Thank you,  
Charles Seife

-----

Charles Seife, Associate Professor  
Arthur L. Carter Journalism Institute  
New York University  
+1 212 998 7894; charles.seife@nyu.edu

## EXHIBIT 6

## DEPARTMENT OF HEALTH &amp; HUMAN SERVICES

Public Health Service

National Institutes of Health  
Bethesda, Maryland 20892  
[www.nih.gov](http://www.nih.gov)

June 30, 2011

Mr. Charles Seife  
Associate Professor  
New York University  
20 Cooper Square, 6<sup>th</sup> Floor  
New York, New York 10003

Re: NIH FOI Case No. 38631

Dear Mr. Seife:

This is the final response to your February 24, 2011, Freedom of Information Act (FOIA) request addressed to the Freedom of Information Office, National Institutes of Health (NIH). Department of Health and Human Services (DHHS) policy calls for the fullest possible disclosure provided by the FOIA, 5 U.S.C. § 552, consistent with the protections contained therein. The implementing DHHS FOIA Regulations establish the criteria under which the FOIA is administered. See 45 CFR Part 5. Copies of the FOIA and the DHHS FOIA Regulations are available on our website at: <http://www.nih.gov/icd/od/foia/efoia.htm>, and <http://www.nih.gov/icd/od/foia/cfr45.htm>

You requested various ethics-related documents pertaining to 44 named individuals from January 1, 2005 to February 28, 2011. In an email dated March 2, 2011, to a member of my staff, you clarified that you did not want to receive any OGE-450 forms. Specifically you requested the following 13 Items:

1. All NIH-2802 forms filed between January 1, 2005 and February 28, 2011;
2. Any documents related to managing real and/or apparent conflicts of interest;
3. HHS-520 forms;
4. NIH-2657 forms;
5. HHS-521 forms;
6. SF-278 forms;
7. Ethics agreement(s);
8. Documents granting a waiver of actual conflict of interest;
9. Documents granting authorization to participate in an official matter despite appearance of a conflict of interest;
10. Documents requesting or granting recusal or disqualification from official duties;
11. Documentation of a denial of a waiver of actual conflict of interest, authorization to participate in an official matter despite the appearance of a conflict of interest, or request for recusal or disqualification;
12. NIH-2850 forms; and
13. Other fully-or-partially releasable documents in the individual's ethics file dating from January 1, 2005 to the present.

Page 2 – Mr. Seife (38631)

You requested that information for the following 44 individuals as related to their association with the indicated NIH Institute or Center (IC):

Last Name	First Name	MI	IC	Comm.	Subcomm.
Adjei	Alex	A.	CSR	OTC	CONC
Backonia	Miroslav	M.	NINDS	NSD	NSDC
Barzilai	Nir	J.	NIA	NIA	NIAB
Brubaker	Linda		CSR	DKUS	UKGD
Califf	Robert		NIA	NACA	NACA
Camargo	Carlos	A.	NHBLI	HLB	CLTR
Chinnaiyan	Arul	M.	NCI	BSA	BSA
Cohen	Samuel	M.	NIEHS	ESBSC	ESBSC
D'Alessio	David	A.	CSR	EMNR	CIDO
Dutcher	Janice	P.	CSR	OTC	CBSS
Ellis	Matthew	J.	CSR	OTC	CONC
Emerson	Scott	S.	NHBLI	HLB	CLTR
Eng	Charis		NHGRI	HGBSC	HGBSC
Ferrario	Carlos	M.	CSR	CVRS	CCHF
Freston	James	W.	NIDDK	DKNAC	DKNAC
Ganz	Peter		CSR	CVRS	CICS
Gomella	Leonard	G.	NCI	NCI	NCIH
Govindan	Ramaswami		NCI	NCI	NCIH
Harpole	David	H.	CSR	OTC	CBSS
Homes	Gregory	L.	NINDS	NST	NST1
Hooper	David	C.	CSR	IDM	DDR
Kass	David	A.	CSR	CVRS	CCHF
Klein	Robert	F.	NIDDK	DDK	DDKB
Kontos	Christopher	D.	CSR	VH	VCMB
Krystal	John	H.	NIAAA	NCAA	NCAA
Lane	Joseph	M.	NIAMS	AMS	AMS
Margolis	David	M.	CSR	AARR	ACE
Mathew	Sanjay	J.	NIMH	NIMH	ITVA
Pacifici	Roberto		NIAMS	AMS	AMS
Palmer	Jerry	P.	NIDDK	DKNAC	DKNAC
Piedimonte	Giovanni		CSR	CVRS	RIBT
Ptacek	Louis	J.	NINDS	NANDSC	NANDSC
Quinn	David	I.	NCI	NCI	NCIH
Sadoshima	Junichi		CSR	CVRS	MIM
Sethi	Sanjay		CSR	CVRS	LCMI
Sheline	Yvette	I.	CSR	BDCN	NPAS
Smith	David	G.	NCRR	RIRG	RIRGC
Smith	Kimberly	Y.	NIAID	MIDA	AIDS
Snyder	Solomon	H.	NICHD	SMRB	SMRB
Stanberry	Lawrence	R.	NIAID	DIRBSC	DIRBSC
Wohl	David	A.	CSR	AARR	BSCH
Zoghbi	Huda	Y.	NICHD	SMRB	SMRB
Zubieta	Jon-Kar		NIDA	NACDA	NACDA

We searched the files of the Center for Scientific Review (CSR) for records responsive to Items 1 through 13 of your request for Drs. Alex Adjei, Linda Brubaker, David D'Alessio, Janice Dutcher,



Page 3 – Mr. Seife (38631)

Matthew Ellis, Peter Ganz, David Harpole, David Hooper, David Kass, Christopher Kontos, David Margolis, Giovanni Piedimonte, Junichi Sadoshima, Sanjay Sethi, Yvette Sheline, and David Wohl. That search did not produce any responsive records.

We searched the files of the National Cancer Institute (NCI) for records responsive to Items 1 through 13 of your request for Drs. Arul Chinnaiyan, Leonard Gomella, Ramaswami Govindan and David Quinn. With respect to Dr. Chinnaiyan, the search produced 6 pages responsive to Item 8 only, which I have determined to withhold in their entirety pursuant to Exemptions 3, 5 and 6 of the FOIA, 5 U.S.C. §§ 552(b)(3), (b)(5) and (b)(6), and sections 5.64, 5.66 and 5.67 of the DHHS FOIA Regulations, 45 CFR Part 5. With respect to Drs. Gomella, Govindan and Quinn, the search of NCI files did not produce any responsive records.

We searched the files of the National Center for Research Resources (NCRR) for records responsive to Items 1 through 13 of your request for Dr. David G. Smith. That search did not produce any responsive records.

We searched the files of National Human Genome Research Institute (NHGRI) for records responsive to Items 1 through 13 of your request for Dr. Charis Eng. That search produced 3 pages responsive to Item 8 only, which I have determined to withhold in their entirety pursuant to Exemptions 3, 5 and 6 of the FOIA, 5 U.S.C. §§ 552(b)(3), (b)(5) and (b)(6), and sections 5.64, 5.66 and 5.67 of the DHHS FOIA Regulations, 45 CFR Part 5.

We searched the files of the National Heart Lung and Blood Institute (NHLBI) for records responsive to Items 1 through 13 of your request for Drs. Carlos Camargo and Scott Emerson. That search did not produce any responsive files.

We searched the files of the National Institute on Aging (NIA) for records responsive to Items 1 through 13 for Drs. Nir Barzilai and Robert Califf. With respect to Dr. Califf, the search of NIA files produced 2 pages responsive to Item 8 only, which I have determined to withhold in their entirety pursuant to Exemptions 3, 5 and 6 of the FOIA, 5 U.S.C. §§ 552(b)(3), (b)(5) and (b)(6), and sections 5.64, 5.66 and 5.67 of the DHHS FOIA Regulations, 45 CFR Part 5. With respect to Dr. Barzilai, the search of NIA files did not produce any responsive records.

We searched the files of the National Institute on Alcohol Abuse and Alcoholism (NIAAA) for records responsive to Items 1 through 13 of your request for Dr. John Krystal. That search produced 14 pages responsive to Item 10 only, which I have determined to withhold in their entirety pursuant to Exemptions 3, 5 and 6 of the FOIA, 5 U.S.C. §§ 552(b)(3), (b)(5) and (b)(6), and sections 5.64, 5.66 and 5.67 of the DHHS FOIA Regulations, 45 CFR Part 5.

We searched the files of the National Institute of Allergy and Infectious Diseases (NIAID) for records responsive to Items 1 through 13 of your request for Drs. Kimberly Smith and Lawrence Stanberry. With respect to Dr. Stanberry, the search of NIAID files produced 3 pages responsive to Item 8 only, which I have determined to withhold in their entirety pursuant to Exemptions 3, 5 and 6 of the FOIA, 5 U.S.C. §§ 552(b)(3), (b)(5) and (b)(6), and sections 5.64, 5.66 and 5.67 of the DHHS FOIA Regulations, 45 CFR Part 5. With respect to Dr. Smith, the search of NIAID files did not produce any responsive records.

Page 4 – Mr. Seife (38631)

We searched the files of the National Institute of Arthritis and Musculoskeletal and Skin Diseases (NIAMS) for records responsive to Items 1 through 13 of your request for Drs. Joseph Lane and Roberto Pacifici. That search did not produce any responsive records.

We searched the files of the National Institute of Child Health and Human Development (NICHD) for records responsive to Items 1 through 13 of your request for Drs. Scott Rivkees, Solomon Snyder and Huda Zoghbi. That search produced a total of 6 pages (Dr. Snyder (3 pages)) and Dr. Zoghbi (3 pages)) responsive to Item 8 only, which I have determined to withhold in their entirety pursuant to Exemptions 3, 5 and 6 of the FOIA, 5 U.S.C. §§ 552(b)(3), (b)(5) and (b)(6), and sections 5.64, 5.66 and 5.67 of the DHHS FOIA Regulations, 45 CFR Part 5. With respect to Dr. Rivkees, the search of NICHD files did not produce any responsive records.

We searched the files of the National Institute on Drug Abuse (NIDA) for records responsive to Items 1 through 13 of your request for Dr. Jon-Kar Zubieta. That search produced 3 pages responsive to Item 10 only, which I have determined to withhold in their entirety pursuant to Exemptions 3, 5 and 6 of the FOIA, 5 U.S.C. §§ 552(b)(3), (b)(5) and (b)(6), and sections 5.64, 5.66 and 5.67 of the DHHS FOIA Regulations, 45 CFR Part 5.

We searched the files of the National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK) for records responsive to Items 1 through 13 of your request for Drs. James Freston, Robert Frederick Klein and Jerry Palmer. That search did not produce any responsive records.

We searched the files of the National Institute of Environmental Health Sciences (NIEHS) for records responsive to Items 1 through 13 of your request for Dr. Samuel M. Cohen. That search produced a total of 6 pages responsive to Item 8 (3 pages) and Item 10 (21 pages) which I have determined to withhold in their entirety pursuant to Exemptions 3, 5 and 6 of the FOIA, 5 U.S.C. §§ 552(b)(3), (b)(5) and (b)(6), and sections 5.64, 5.66 and 5.67 of the DHHS FOIA Regulations, 45 CFR Part 5.

We searched the files of the National Institute of Mental Health (NIMH) for records responsive to Items 1 through 13 of your request for Dr. Mathew Sanjay. That search did not produce any responsive records.

Finally, we searched the files of the National Institute of Neurological Disorders and Stroke (NINDS) for records responsive to Items 1 through 13 of your request for Drs. Miroslav Backonia, Gregory Holmes and Louis Ptacek. With respect to Dr. Ptacek, the search produced 18 pages responsive to Item 8 only, which I have determined to withhold in their entirety pursuant to Exemptions 3, 5 and 6 of the FOIA, 5 U.S.C. §§ 552(b)(3), (b)(5) and (b)(6), and sections 5.64, 5.66 and 5.67 of the DHHS FOIA Regulations, 45 CFR Part 5. With respect to Drs. Backonia and Holmes, the search of NINDS files did not produce any responsive records.

Exemption 3 protects from release records or information that is specifically exempt from disclosure by another federal statute. In this instance, disclosure is prohibited by the Ethics in Government Act, 5 U.S.C. App. 4, Section 107(a)(2), which prohibits the disclosure of any information contained in a Confidential Financial Disclosure Report (OGE 450). Exemption 5



Page 5 – Mr. Seife (38631)

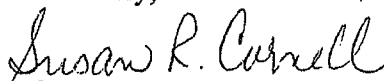
protects the integrity of the deliberative or policy-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within interagency or intra-agency memoranda or letters. Exemption 6 exempts from disclosure records the release of which would cause a clearly unwarranted invasion of personal privacy.

Please understand that the majority of forms/records you requested apply only to full-time equivalent employees or to Special Government Employees (SGE), and do not apply to individuals who serve as peer reviewers. SGEs file Confidential Financial Disclosure Reports (OGE 450) and the release of any information contained in an OGE 450 is governed by the provisions of The Ethics in Government Act, as explained above.

You have a right to appeal this determination to deny you access to information within the Agency's possession and that no records exist that would be responsive to part of your request. Should you wish to do so, you must send your appeal within 30 days of receipt of this letter to the Director, News Division, Office of the Assistant Secretary for Public Affairs, Department of Health and Human Services (DHHS), Suite 920, 7700 Wisconsin Avenue, Bethesda, Maryland 20857, following the procedures outlined in Subpart C of the DHHS FOIA Regulation. Please mark both the envelope and the appeal letter "FOIA Appeal."

In certain circumstances provisions of the FOIA and DHHS FOIA Regulations allow us to recover part of the cost of responding to your request. Because no unusual circumstances apply to the processing of your request, there is no charge associated with our response.

Sincerely,



Susan R. Cornell, J.D.  
FOIA Officer, NIH  
Building 31, Room 5B35  
9000 Rockville Pike  
Bethesda, MD 20892

**NEW YORK UNIVERSITY**

## ARTS &amp; SCIENCE

Charles Seife, Associate Professor

ARTHUR L. CARTER JOURNALISM INSTITUTE

TO: Director, News Division  
Office of the Assistant Secretary for Public Affairs  
Department of Health and Human Services (DHHS)  
Suite 920  
7700 Wisconsin Avenue  
Bethesda, MD 20857

RE: FOIA Appeal, NIH FOI Case No. 38631

14 July 2011

To whom it may concern:

This is an appeal under the Freedom of Information Act.

The appeal concerns my FOI request dated 24 February 2011, case number 38631.

I appeal the agency's response to my request for the following reasons:

1) The response was wholly unresponsive to my request for copies of "All NIH-2802 forms filed between January 1 2005 and February 28 2011." Not only were these documents not furnished, no explanation for the denial was given. It was not even indicated whether a search for these documents was made.

According to NIH documents, by January 31st each year, each DEC must report to the number and types of referrals to supervisors during the previous calendar year, using form NIH-2802, "Annual Report of Referrals for Non-Compliance With Ethics Requirements." These forms are also given to the Office of General Counsel.

Note that in my FOIA request, I requested *all* NIH-2802 forms that have been filed. I did *not* request only ones associated with the 44 named individuals -- indeed, one would not expect that these forms be associated with individuals.

It strains credulity to believe that in the past half decade no NIH-2802 forms have been filed. If this is, in fact, the case, NIH should indicate that a search was made and that no such forms have been found.

I therefore request the reversal of the decision to deny my request for copies of all NIH-2802 forms filed between January 1, 2005 and February 28, 2011

2) Though a search apparently located relevant documents, specifically,  
"Documents granting a waiver of actual conflict of interest" for the following individuals:

Arul Chinnaiyan  
Charis Eng  
Robert Califf



Lawrence Stanberry  
Solomon Snyder  
Huda Zogbi  
Samuel Cohen  
Louis Ptacek

and "Documents requesting or granting recusal or disqualification from official duties" for the following individuals:

John Krystal  
Jon-Kar Zubieta  
Samuel Cohen

Each was "withheld in their entirety pursuant to exemptions 3, 5, and 6 of the FOIA...." However, the decision to withhold these documents is in error for the following reasons:

**a) Federal law, specifically 18 USC §208, dictates that these documents should be released to the public upon request.**

18 USC §208(d)(1) specifically states that "Upon request, a copy of any determination granting an exemption under section (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption..."

Office of Government Ethics guidelines mirror the statute's language: "A copy of an agency waiver issued pursuant to 18 U.S.C. 208 (b)(1) or (b)(3) shall be made available upon request to the public by the issuing agency."

The documents I request -- documents granting a waiver of actual conflict of interest and/or documents... granting recusal or disqualification from official activities -- are all determinations granting exemptions that fall under 18 USC §208(b)(3), as these individuals are Special Government Employees serving on advisory committees within the meaning of the Federal Advisory Committee Act, and, otherwise should fall under 18 USC §208(b)(1) unless the financial interest has been deemed too remote or inconsequential to affect the integrity of the individual's services.

By explicitly stating that these determinations should be made available to the public upon request, the Code clearly presumes that these waivers are, by default, releasable, even though these waivers presumably include personally identifiable information and financial information. It also presumes that these waivers are not by default exempt from disclosure pursuant to the FOIA.

To the extent that any of these waivers provide information that is more extensive than required to be disclosed by the individual, I request that the superlative information be redacted and the remainder be disclosed.

This, alone, should be sufficient to show that the agency erred in withholding these documents. However, I shall provide additional reasons:



**b) The agency erred in determining that each of these documents were exempt pursuant to exemptions 3, 5 and 6 of the FOIA**

i) The agency's response indicates that the documents in question are subject to FOIA exemption 3 because they are specifically exempt from disclosure by another federal statute, to wit, 5 USC App. 4 Sec. 107(a)(2). This is not the case.

Firstly, the instruction in 18 USC §208(d)(1) to release these documents to the public shows that releasing these documents is not prohibited by federal statute.

Secondly, the statute cited by NIH exempts OGE-450 forms from public disclosure, as the NIH readily admits. ("[the statute] prohibits disclosure of any information contained in a Confidential Financial Disclosure Report (OGE 450).") The wording of the statute in question, 5 USC App. §§107, also shows that it protects "confidential financial disclosure reports" that are required by the an agency's supervising ethics office -- i.e. OGE-450s.

However, I did not request the information contained in OGE-450 forms, or any other "confidential financial disclosure reports." I specifically informed the FOIA officer that I was not requesting OGE-450 forms, as I was aware that these forms were exempt from disclosure. (See enclosure 2.) In addition, the agency's response acknowledges that I was not seeking these forms. ("... you clarified that you did not want to receive any OGE-450 forms.") I am requesting information contained in different paperwork entirely -- documents granting a waiver of actual conflict of interest or recusal or disqualification from official activities.

As the documents I request are not OGE-450 forms, and are not in any other sense "confidential financial disclosure reports" or "...information required to be provided by an individual under this statute [5 USC App. §§107]" 5 USC App. §§107(a)(2) is inapplicable to my request. Therefore, NIH erred in withholding the documents in question pursuant to exemption 3 of the FOIA.

ii) The agency's response indicates that the documents in question are subject to FOIA exemption 5 because doing so "protects the integrity of the deliberative or policy-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within interagency or intra-agency memoranda or letters." This is not the case.

Firstly, the instruction in 18 USC §208(d)(1) to release these documents to the public indicates that the documents are not, *a priori*, considered to be dangerous to the integrity of the deliberative or policy-making processes within the agency.

Secondly, for NIH to invoke exemption 5 of the FOIA, it must show (a) that the document is predecisional, and (b) the document is deliberative. The burden of proof is upon the agency to prove that both of these conditions are met. In fact, neither is.

The documents requested are standard paperwork providing the official documentation of a decision to grant a waiver, recusal, or disqualification from duties. There is no predecisional or deliberative character to these documents.

Further, these documents implement an established policy of the NIH, and as such, are not subject to exemption 5. (See, e.g., *Brinton v. Department of State*, 636 F. 2d 600 "Exemption 5 does not protect... communications that promulgate or implement an established policy of an agency.")



Further, these documents also reflect final decisions about whether or not to grant waivers, recusals, or disqualification from duties, and are thus not subject to exemption 5. (See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132)

Further, these documents are largely factual, and, thus, contain information in them that consists of purely factual matters. Factual portions even of otherwise deliberative documents must be segregated out and released. (See, e.g. *EPA v. Mink*, 410 U.S. 73, 91)

Therefore, NIH erred in withholding the documents in question pursuant to exemption 5 of the FOIA.

iii) The agency's response indicates that the documents in question are subject to FOIA exemption 6 because releasing the documents "would cause a clearly unwarranted invasion of personal privacy." This is not the case.

Firstly, the instruction 18 USC §208(d)(1) to release these documents to the public indicates that releasing the documents are not, *a priori*, considered to be a clearly unwarranted invasion of personal privacy.

Secondly, releasing the information contained in these documents can not be considered an unwarranted invasion of personal privacy because other government agencies -- including ones in the same Department as the NIH -- routinely release equivalent information to the public. The Food and Drug Administration, for example, makes public the type, nature, and magnitude of the financial interests of each Advisory Committee member requesting a waiver, as well as FDA's reasons for granting each waiver. The documents withheld by NIH are exact analogs to those that FDA makes public as a matter of course -- containing almost exactly the same information and applicable to equivalent personnel. Therefore their release can not be considered a "clearly unwarranted invasion of personal privacy."

Thirdly, in deciding whether disclosure of a document would be an unwarranted invasion of personal privacy, the agency must balance the privacy interest (if any) against the public interest in disclosure.

The privacy interest in withholding these documents is not significant. There is not even a *de minimis* interest in protecting whether or not a waiver, recusal, or disqualification has been granted to an individual. There is a slight interest in protecting information about why -- in broad terms -- why a waiver, recusal, or disqualification has been requested or granted. The strongest privacy interest is with regard to the size and nature of the financial interests which led to the waiver, recusal, or disqualification, but, as shown by the routine release of this information by other agencies, this privacy interest is not significant.

The public interest in the disclosure of these documents is very significant. I need not remind the NIH that it has a long history of problems with conflict-of-interest disclosures in general, and specifically with its advisory-committee members (see, e.g. *United States of America v. Pearson "Trey" Sunderland III*, JFM-06-0537 [District Court of Maryland]). The documents I request are targeted at finding similar abuses. Each individual in the request has received many thousands of dollars from pharmaceutical companies in recent years (for example, Arul Chinnaiyan received \$21,000 from GlaxoSmithKline in 2010), so an examination of the waiver process for these individuals bears directly on the question of whether these abuses are ongoing, and is likely to contribute significantly to public understanding of the operations and activities of the government.

Thus, the privacy interest served by withholding these documents is much less significant than the public interest in disclosure. As a result, NIH erred in withholding these documents pursuant to exemption 6 of the FOIA.





iv) The uniformity of the agency's response indicates that it was not properly considering the necessary issues to determine whether or not each document should be released.

As outlined above, proper application of a FOIA exemption requires careful consideration of a number of factors, such as balancing the damage to a privacy interest by releasing the document with the damage to the public interest by withholding. It is hard to believe that after such careful weighing, every single one of these documents -- regardless of the variations in content -- all come down in exactly the same way for all three exemptions invoked. Therefore, the agency does not appear to have exercised the diligence it is required to in determining whether or not to exempt a document from release.

As a result, NIH erred in its determinations to withhold these documents due to exemptions 3, 5, and 6 of the FOIA.

Because of arguments (i), (ii), (iii), and (iv) above, NIH erred in withholding the documents in question pursuant to exemptions 3, 5, and 6 of the FOIA. I therefore request the reversal of the decision to withhold these documents.

**c) The agency erred in withholding the documents in entirety rather than releasing the reasonably segregable portions of the records after the exempt portions have been redacted**

For every single one of the withheld documents -- even though many of them had a significant number of pages -- the documents were withheld in entirety. This runs counter to the instruction in the FOIA (5 USC §552(b)): "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

Even if, contrary to my arguments, certain sections of the documents are exempt from release pursuant to FOIA exemptions 3, 5, and/or 6, it strains credulity to believe that there are no reasonably segregable portions of these documents that would be releasable.

Thus, NIH was in error in withholding the documents in entirety, and I therefore request the reversal of the decision to withhold the entire documents and release the reasonably segregable portions as required by law.

In sum, I believe that NIH's decision is not only wrong; I believe that it is arbitrary and capricious. Not only did the agency wholly fail to respond to one element of my FOIA request, it applied specious reasoning to exempt documents -- in entirety, contrary to law -- under dubious pretexts. I therefore request a reversal of the decision and release of the documents I request, or, at the very least, the release of the reasonably segregable portions of those documents.

Finally, I wish also to assert, once again, that I am requesting a waiver of fees. I have previously done so over the telephone and again in writing (see enclosure 3) before the FOIA was processed. I am a professor of



journalism and a working journalist who publishes regularly in newspapers, magazines, online, and in books. This particular FOI request is intended to provide information for a journalistic work in progress which is intended for publication in a major magazine.

As a member of the media, I am entitled to be placed in the "news media, educational, or scientific requesters" category. As such, I should only be charged for duplication fees beyond the first 100 pages.

Further, I assert that this request is in the public interest, because it is likely to contribute significantly to public understanding of the operations and activities of the government, and I therefore request a waiver of fees.

Thank you,

Charles Seife





EXHIBIT 8

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Program Support Center

Division of FOIA Services  
7700 Wisconsin Avenue, Suite 920  
Bethesda, Maryland, 20857  
PH: 301-492-4800  
Fax: 301-492-4848

Request Number: PHS - 11-0543 - AA  
Date Received: 7/25/2011

July 25, 2011

Charles Seife  
New York University Arts and Science  
20 Cooper Square, 6th Floor  
New York, NY 10003

Dear Requester:

This acknowledges receipt of your administrative appeal received by this office on the date above. Your appeal has been assigned the above-stated case number based on its receipt in this office.

The number assigned to the original request which you are appealing is:

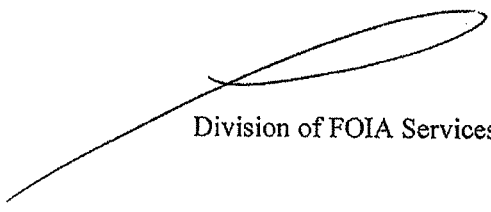
The subject of the original request was:

Appealing NIH's adequacy of search and denial of records pertaining to various ethics related documents. NIH Case number 38631.

Any questions regarding the status of your appeal should be directed to the Public Health Service (PHS) Freedom of Information (FOI) office.

Please reference this number on your correspondence.

Sincerely Yours,



Division of FOIA Services



## EXHIBIT 9

Delivered-To: cs129@nyu.edu  
 Received: by 10.229.189.13 with SMTP id dc13cs173533qcb;  
 Tue, 23 Aug 2011 11:54:17 -0700 (PDT)  
 Received: by 10.224.178.74 with SMTP id bl10mr2595859qab.127.1314125656484;  
 Tue, 23 Aug 2011 11:54:16 -0700 (PDT)  
 Return-Path: <cs129@nyu.edu>  
 Received: from gmx1.home.nyu.edu (GMX1.HOME.NYU.EDU. [128.122.118.128])  
 by mx.google.com with ESMTP id fg8si370355qab.93.2011.08.23.11.54.16;  
 Tue, 23 Aug 2011 11:54:16 -0700 (PDT)  
 Received-SPF: pass (google.com: best guess record for domain of cs129@nyu.edu  
 designates 128.122.118.241 as permitted sender) client-ip=128.122.118.241;  
 Authentication-Results: mx.google.com; spf=pass (google.com: best guess  
 record for domain of cs129@nyu.edu designates 128.122.118.241 as permitted  
 sender) smtp.mail=cs129@nyu.edu  
 Received: from mx1.nyu.edu (MX1.NYU.EDU [128.122.118.241])  
 by gmx1.home.nyu.edu (8.13.8/8.13.8) with ESMTP id p7NIsgVf015774  
 for <cs129@nyu.edu>; Tue, 23 Aug 2011 14:54:16 -0400 (EDT)  
 Received: from mx1.nyu.edu (localhost [127.0.0.1])  
 by mx1.nyu.edu (8.13.8/8.13.8) with ESMTP id p7NIsgFpH015767  
 for <cs129@nyu.edu>; Tue, 23 Aug 2011 14:54:15 -0400 (EDT)  
 Received: from [192.168.1.125] (cpe-69-204-248-252.nyc.res.rr.com  
 [69.204.248.252])  
 (authenticated bits=0)  
 by mx1.nyu.edu (8.13.8/8.13.8) with ESMTP id p7NIsgFJX015753;  
 Tue, 23 Aug 2011 14:54:15 -0400 (EDT)  
 Message-ID: <4E53F776.90206@nyu.edu>  
 Date: Tue, 23 Aug 2011 14:54:46 -0400  
 From: Charles Seife <cs129@nyu.edu>  
 Reply-To: cs129@nyu.edu  
 User-Agent: Mozilla/5.0 (Windows; U; Windows NT 6.1; en-US; rv:1.9.1.9)  
 Gecko/20100722 Eudora/3.0.4  
 MIME-Version: 1.0  
 To: Amy.McNulty@PSC.HHS.gov  
 Subject: FOIA Appeal Request #PHS-11-0543-AA  
 Content-Type: text/plain; charset=ISO-8859-1; format=flowed  
 Content-Transfer-Encoding: 7bit

Dear Ms. McNulty,

DHHS acknowledged the receipt of my administrative appeal on 7/25/2011.  
 As the statutory time limit for response to my appeal has expired, I  
 contacted the DHHS FOIA office by telephone yesterday to get a status  
 update.

I was told that the appeal had been sent over to NIH but had not yet  
 been processed. In your follow-up call this morning, you said that NIH  
 said there were "a couple of appeals" in front of mine and that the  
 Department would "get to it as soon as we can."

If you're able, could you tell me:

1) How many appeals are ahead of mine? Are they NIH appeals, as you  
 imply? I note that DHHS annual FOIA reports reveal that NIH has not had  
 any appeals in the past few years, so I find it odd that there are  
 multiple NIH appeals ahead of mine.

2) When is it expected that my appeal will be processed? In rough

terms... is it a matter of days, a few weeks, a month or two, or longer?

3) What is the statutory or regulatory basis for taking longer than 20 days for responding to my appeal? I understand that NIH uses multitrack processing for FOIA requests -- does it do so for appeals as well? If so, could you point me to the regulatory basis for this? Also, how has my appeal been classified... simple, or complex?

I'd also like to take the opportunity to remind you that I am a journalism professor and working journalist who's made this FOIA request in furtherance of a piece that I intend to publish in a national magazine. I therefore assert that the prompt release of the documents I request is in the public interest, as it is likely to contribute significantly to public understanding of the operations and activities of the government.

Thank you,  
Charles Seife

## EXHIBIT 10

X-Mozilla-Status: 0011  
X-Mozilla-Status2: 00000000  
Delivered-To: cs129@nyu.edu  
Received: by 10.229.189.13 with SMTP id dc13cs227602qcb;  
Thu, 25 Aug 2011 04:53:20 -0700 (PDT)  
Received: by 10.229.73.68 with SMTP id p4mr403128qcj.78.1314273200411;  
Thu, 25 Aug 2011 04:53:20 -0700 (PDT)  
Return-Path: <FOIARequest@psc.hhs.gov>  
Received: from gmx1.home.nyu.edu (GMX8.HOME.NYU.EDU [128.122.118.135])  
by mx.google.com with ESMTP id z17si317119qct.43.2011.08.25.04.53.19;  
Thu, 25 Aug 2011 04:53:19 -0700 (PDT)  
Received-SPF: neutral (google.com: 128.122.118.246 is neither permitted nor  
denied by best guess record for domain of FOIARequest@psc.hhs.gov) client-  
ip=128.122.118.246;  
Authentication-Results: mx.google.com; spf=neutral (google.com:  
128.122.118.246 is neither permitted nor denied by best guess record for  
domain of FOIARequest@psc.hhs.gov) smtp.mail=FOIARequest@psc.hhs.gov  
Received: from mx6.nyu.edu (MX6.NYU.EDU [128.122.118.246])  
by gmx1.home.nyu.edu (8.13.8/8.13.8) with ESMTP id p7PBrJvO016063  
for <cs129@nyu.edu>; Thu, 25 Aug 2011 07:53:19 -0400 (EDT)  
Received: from r1.home.nyu.edu (R1.HOME.NYU.EDU [128.122.118.240])  
by mx6.nyu.edu (8.13.8/8.13.8) with ESMTP id p7PBqocY005259  
for <cs129@nyu.edu>; Thu, 25 Aug 2011 07:53:18 -0400 (EDT)  
Received: from smtp.hhs.gov (HELO smtp01.ees.hhs.gov) ([158.72.139.19])  
by r1.home.nyu.edu with ESMTP; 25 Aug 2011 07:53:18 -0400  
X-IronPort-AV: E=Sophos;i="4.67,427,1309752000";  
d="scan'208";a="7926564"  
Received: from unknown (HELO mail2.hhs.gov) ([158.72.139.33])  
by smtp01.ees.hhs.gov with ESMTP; 25 Aug 2011 07:53:18 -0400  
Received: from PL-EMSMB3.ees.hhs.gov ([158.72.137.13]) by pl-emscas02  
([158.72.137.52]) with mapi; Thu, 25 Aug 2011 07:53:17 -0400  
From: PSC FOIA Request <FOIARequest@PSC.hhs.gov>  
To: "'cs129@nyu.edu'" <cs129@nyu.edu>  
Date: Thu, 25 Aug 2011 07:53:16 -0400  
Subject: RE: FOIA Appeal Request #PHS-11-0543-AA  
Thread-Topic: FOIA Appeal Request #PHS-11-0543-AA  
Thread-Index: Acxhxg+lcyn0KToqQHGCPhSmd3WAfwBV0Zng  
Message-ID: <E66AD8BFFFA2F54DBB316227E7C046B9F3402FAA0D@PL-  
EMSMB3.ees.hhs.gov>  
References: <4E53F776.90206@nyu.edu>  
In-Reply-To: <4E53F776.90206@nyu.edu>  
Accept-Language: en-US  
Content-Language: en-US  
X-MS-Has-Attach:  
X-MS-TNEF-Correlator:  
acceptlanguage: en-US  
Content-Type: text/plain; charset="us-ascii"  
Content-Transfer-Encoding: quoted-printable  
MIME-Version: 1.0

Mr. Seife,

I have received your e-mail below. We will send you a formal response to y=  
our inquiry shortly.

Thanks,

Amy McNulty

-----Original Message-----

From: Charles Seife [mailto:cs129@nyu.edu]

Sent: Tuesday, August 23, 2011 2:55 PM

To: McNulty, Amy (PSC/ISMS)

Subject: FOIA Appeal Request #PHS-11-0543-AA

Dear Ms. McNulty,

DHHS acknowledged the receipt of my administrative appeal on 7/25/2011. As the statutory time limit for response to my appeal has expired, I contacted the DHHS FOIA office by telephone yesterday to get a status update.

I was told that the appeal had been sent over to NIH but had not yet been processed. In your follow-up call this morning, you said that NIH said there were "a couple of appeals" in front of mine and that the Department would "get to it as soon as we can."

If you're able, could you tell me:

1) How many appeals are ahead of mine? Are they NIH appeals, as you imply? I note that DHHS annual FOIA reports reveal that NIH has not had any appeals in the past few years, so I find it odd that there are multiple NIH appeals ahead of mine.

2) When is it expected that my appeal will be processed? In rough terms... is it a matter of days, a few weeks, a month or two, or longer?

3) What is the statutory or regulatory basis for taking longer than 20 days for responding to my appeal? I understand that NIH uses multitrack processing for FOIA requests -- does it do so for appeals as well? If so, could you point me to the regulatory basis for this? Also, how has my appeal been classified... simple, or complex?

I'd also like to take the opportunity to remind you that I am a journalism professor and working journalist who's made this FOIA request in furtherance of a piece that I intend to publish in a national magazine. I therefore assert that the prompt release of the documents I request is in the public interest, as it is likely to contribute significantly to public understanding of the operations and activities of the government.

Thank you,  
Charles Seife



DEPARTMENT OF HEALTH & HUMAN SERVICES

Program Support Center

Division of FOIA Services  
7700 Wisconsin Avenue, Suite 920  
Bethesda, Maryland 20857  
PH: 301-492-4800  
Fax: 301-492-4848

Appeal Case No.: 11-0543AA  
NIH Case Nos.: 38631

September 16, 2011

*Sent via facsimile and electronic mail*

Charles Seife  
New York University  
Arts and Science  
20 Cooper Square, 6<sup>th</sup> Floor  
New York, NY 10003  
[Charles.seife@nyu.edu](mailto:Charles.seife@nyu.edu)  
Fax: (212) 995-4148

Dear Mr. Seife:

This is in response to your July 14, 2011, letter in which you appealed the National Institutes of Health (NIH) adequacy of search and denial of records in response to your Freedom of information Act (FOIA) request for records pertaining to various ethics related documents. Your appeal was received in our office on July 22, 2011.

On August 22, 2011, you inquired as to the status of your appeal.

Your appeal is pending at NIH. NIH has numerous active appeals. The appeal process involves coordination between the subject matter and FOIA experts.

When we receive the information from NIH, we will process it as expeditiously as possible to resolve the issues raised in your appeal. Because of the volume of appeals that are received, we are unable to comply with the 20 working days time limit as provided by statute. However, we presume your appeal should be completed in the next few months.

Thank you for your inquiry.

Sincerely,

Carol Maloney  
Director  
Division of FOIA Services